

ONTARIO COURT OF JUSTICE

CITATION: *R. v. Shergill*, 2016 ONCJ 163

DATE: 2016-03-23

COURT FILE No.: Kitchener 4460 1788034B

IN THE MATTER OF an appeal under the *Provincial Offences Act*, R.S.O. 1990, c. P.33, as amended;

B E T W E E N :

HER MAJESTY THE QUEEN
Appellant

— AND —

MANDEEP SHERGILL
Respondent

Before Justice M.J. Epstein
Heard on November 19, 2015
Reasons for Judgment released on March 23, 2016

Mr. D. Dyer counsel for the prosecution
Mr. N. Lund agent for the defendant Mandeep Shergill

On appeal from an acquittal by Justice of the Peace Z. Radulovic on February 12, 2015.

Epstein J.:

[1] This is a Crown appeal of an acquittal following trial on a charge of careless driving, contrary to s. 130 of the *Ontario Highway Traffic Act*.

TRIAL EVIDENCE:

[2] On the 5th of March 2014, a sunny and dry day, the defendant was operating a tractor trailer vehicle on Hwy. 24 and was following a milk truck which was also a tractor trailer. This was a two lane paved highway with a speed limit of

80 kilometres per hour. The road had been straight and flat for some distance, but at the point where the incident giving rise to this charge occurred, there was a very gradual curve to the right. It appears from the evidence that visibility was unobstructed and that the curve in the roadway played no part in the occurrence. This location was in the country outside the city in an area sparsely dotted by farms and houses.

[3] The driver of the milk truck intended to make a left turn at an intersecting country road. He had been travelling at 75 to 80 kilometres per hour. He put on his left signal and applied his brakes well before the intersection in order to slow his vehicle. He estimated that it took five to eight seconds for his vehicle to come to a stop. He had to wait for two oncoming cars to pass before it was safe to turn. He said that he was at a full stop for about five seconds and when it was clear for him to make the turn he slowly began to move forward. He was part way into his turn, about two to three seconds from his stopped position, when his trailer was struck in the rear by the following tractor trailer. There was almost \$10,000 damage to the milk truck.

[4] When police attended skid marks were observed on the roadway and they appeared associated to the vehicle operated by the defendant. Police noted that the signal lights and brake lights on the milk truck were properly operating.

[5] The defendant testified. It was his position that the milk truck began to slow without any indication of brake lights or signal light and that it came to a sudden stop. He testified that for several kilometres he had been following the milk truck at a safe distance of 50 metres or so and that when he realized that the vehicle in front was stopping he immediately applied his brakes but was unable to avoid the collision.

THE REASONS FOR JUDGMENT AT TRIAL:

[6] The Justice of the Peace reviewed all of the evidence. She accepted the evidence of the milk truck driver. She specifically rejected the evidence of the defendant in relation to his allegation of a sudden stop by the milk truck. She said, "There must be something what defendant did not take into consideration or did not pay enough attention when he was behind the truck and trailer operated by Mr. Madden."

[7] Later in her judgment she indicated that it was evident that the accident occurred "as a result of error in judgment. If defendant did keep little bit further distance or maybe reduce the speed, maybe the accident would not occur. But that inadvertent negligence did not constitute the careless driving because there is nothing in his manner of driving prior to this incident which would indicate to the court that he was driving without paying or taking due care and attention of what is

happening in front of him.” She indicated that it was on that basis that she was dismissing the charge.

[8] The Justice of the Peace placed considerable reliance on *R. v. Beauchamp* [1952] O.J. No. 495, a decision of the Ontario Court of Appeal. She referred to it as the “leading case” on careless driving. She quoted liberally from *Beauchamp* particularly as it related to the requirement that the court’s analysis be contextual taking into account all of the circumstances. She referred specifically to the test established in *Beauchamp* that the conduct of a defendant must be measured against what the average careful person would have done in similar circumstances. However, she then added, “Court considers that to sustain conviction of careless driving the Crown must demonstrate beyond reasonable doubt that accused departed sufficiently from the standard of care expected of prudent and reasonable driver to make the driving this way **deserving punishment.**” (Emphasis added)

[9] The Justice of the Peace made reference in her reasons for decision to the fact that the respondent had apparently been following the milk truck for a distance of approximately five kilometres prior to the accident without any incident. She concluded that there was nothing unusual in the driving of the respondent over that distance which would indicate that he was operating his vehicle in a manner inconsistent with that of a reasonably prudent driver.

ISSUES RAISED BY THIS APPEAL:

[10] The issues raised by this appeal are as follows:

1. What is the *actus reus* element of careless driving?
2. To the extent that it imports to the charge of careless driving a consideration that the “conduct must be of such a nature that it can be considered a breach of duty to the public and deserving of punishment” does *Beauchamp* survive subsequent decisions by Provincial Appellate Courts and the Supreme Court of Canada?
3. Can the fact of an accident alone establish the *actus reus* of careless driving?
4. Can inadvertent negligence establish careless driving?
5. Is “momentary inattentiveness” a defence to careless driving?
6. What is the impact of evidence of proper driving over some distance and time prior to an incident of alleged careless driving?

1. What is the *actus reus* element of careless driving?

[11] The *actus reus* of an offence must be defined by the words of the statute (see *R. v. Beatty* [2008] 1 S.C.R. 49 at para. 43). The trier of fact must be satisfied beyond a reasonable doubt that the defendant drove a vehicle or streetcar on a highway and that he or she did so without due care and attention or without reasonable consideration for other persons using the highway.

[12] It is clear and conceded by the respondent in this case that careless driving as dealt with by s. 130 of the *Ontario Highway Traffic Act* is a strict liability offence (see *R. v. McIver* [1965] 2 O.R. 475 (Ont.C.A.) and *R. v. Sault Ste. Marie* [1978] 2 S.C.R. 1299 (S.C.C.)). There is no obligation on the Crown to establish a *mens rea* element on a careless driving prosecution. Rather, “the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.” (*Sault St. Marie*, *supra*, page 15) Therefore, the prosecution need only prove the *actus reus* of the offence of careless driving. The defendant stands to be convicted unless he can establish that he took all reasonable care.

2. To the extent that it imports to the charge of careless driving a consideration that the “conduct must be of such a nature that it can be considered a breach of duty to the public and deserving of punishment” does *Beauchamp* survive subsequent decisions by Provincial Appellate Courts and the Supreme Court of Canada?

[13] The Ontario Court of Appeal decision in *R. v. Beauchamp* (*supra*) was released in 1952. In many respects it has withstood the test of time. In some respects it remains authoritative in my view. It is often cited in support of the proposition that a standard of perfection is not demanded of a driver. There can be no question that *Beauchamp*’s characterization of the duty upon a driver being the exercise of a reasonable amount of skill and to do what an ordinary prudent person would do in the circumstances is still the law. It is, of course, accepted that *Beauchamp* correctly characterized the factual standard as constantly shifting, depending on road, visibility, weather, traffic and other conditions in existence and that the standard is an objective one. *Beauchamp* also stated that it was not enough to support a careless driving conviction that the defendant’s conduct should be shown to fall below this objective standard. It was held that since careless driving was an offence that was quasi-criminal in nature, it must also appear that the defendant’s conduct was of such a nature that it could be considered a breach of duty to the public, and as such deserving of punishment by the state. It is this proposition that requires examination in light of subsequent jurisprudence.

Beauchamp, on the one hand, makes it clear that the conduct of the defendant must be measured against the standard of a reasonable driver. At page 7 *Beauchamp*, MacKay J.A. states:

“It is whether it is proved beyond reasonable doubt that this accused, in the light of existing circumstances of which he was aware or of which a driver exercising ordinary care should have been aware, failed to use the care and attention or to give to other persons using the highway the consideration that a driver of ordinary care would have used or given in the circumstances?”

[14] However, two paragraphs later at page 7 of *Beauchamp* appears the following:

“There is a further important element that must also be considered, namely, that the conduct must be of such a nature that it can be considered a breach of duty to the public and deserving of punishment. **This further step must be taken even if it is found that the conduct of the accused falls below the standard set out in the proceeding paragraphs.**” (Emphasis mine)

[15] This added element of the offence seems to suggest a *mens rea* component to careless driving and appears out of step with subsequent jurisprudence.

[16] In *R. v. Patterson* [1964] 1 O.R. 628 the magistrate concluded that because careless driving was a “quasi-criminal offence” and because *Beauchamp* had made it clear that the conduct must be more than simply substandard and must be “deserving of punishment”, careless driving was a *mens rea* offence. *McIver* and *Sault Ste. Marie* have removed all doubt that this is incorrect and that careless driving is an offence of strict liability.

[17] The British Columbia Court of Appeal in *R. v. Jacobsen* [1964] B.C.J. No. 93, disapproved of the additional element suggested by the Ontario Court of Appeal in *Beauchamp* and found that *O’Grady v. Sparling* [1960] S.C.R. 804, was determinative of the issue. In that case Judson J., speaking for the majority, explored the distinction between “advertent negligence” which constitutes criminal conduct and is dealt with by the relevant sections of the Criminal Code of Canada and “inadvertent negligence” – non-criminal behaviour dealt with under the Provincial legislation in relation to the regulation of highway traffic.

[18] Norris J.A. in *Jacobsen* concluded that the notion that, in a careless driving trial, the conduct must constitute “a breach of duty to the public and deserving of punishment in a criminal way” was “quite foreign to that of ‘inadvertence’ as expounded by Judson J. He concluded that it was the inadvertence itself which constituted the offence of careless driving and that there was no requirement for the prosecutor to establish anything beyond “inadvertence”. The British Columbia Court of Appeal concluded that in light of *O’Grady and Sparling*, *Beauchamp* could not be

followed.

[19] In *R. v. Beatty* [2008] 1. S.C.R. 49, the Supreme Court of Canada dealt with the issue of whether a momentary act of negligence was sufficient to constitute dangerous operation of a motor vehicle causing death within the meaning of s. 249(4) of the Criminal Code. The court concluded that the modified objective test remained the appropriate test to determine the requisite *mens rea* for negligence-based **criminal** offences. There must be a “marked departure” from the civil norm in the circumstances of a **criminal** case. The court was clear to distinguish between Criminal Code offences and Provincial traffic offences. As McLachlin C.J. said at paragraph 71:

“A moment of lapse of attention, in the context of totally normal driving, is insufficient to establish the marked departure required for the offence of dangerous driving. In order to avoid criminal liability, an accused’s driving is not required to meet a standard of perfection. Even good drivers are occasionally subject to momentary lapses of attention. These may, depending on the circumstances, give rise to civil liability, or to **a conviction for careless driving**. But they generally will not rise to the level of a marked departure required for a conviction for dangerous driving.” (Emphasis mine)

[20] These words from McLachlin C.J. in *Beatty* were adopted by Cromwell J. in *R. v. Roy* [2012] S.C.J. No. 26. He reiterated that the Criminal Code charge of dangerous driving causing death required a degree of fault – a marked departure from the standard of care that a reasonable person would observe in all the circumstances. He drew the distinction between a “mere departure from the standard of care” and a “marked departure justifying criminal punishment” in paragraph 28. He said that the lack of care must be **serious enough to merit punishment** when dealing with offences under the **Criminal Code**.

[21] In paragraph 31 Cromwell J. recognized that the Supreme Court of Canada has distinguished between “on the one hand, **simple negligence** that is required to establish civil liability **or guilt of Provincial careless driving** offences and, on the other hand, the significantly greater fault required for the criminal offence of dangerous driving. (Emphasis mine) He concluded that the “marked departure” standard “separates federal criminal law from Provincial regulatory law and ensures that there is an appropriate fault requirement for *Charter* purposes.

[22] In light of jurisprudence since *Beauchamp* it would now appear to be settled law careless driving is a strict liability offence and, since *mens rea* is not a relevant factor for consideration, that the court ought not to look at the conduct to determine whether it is “blameworthy and deserving of punishment”. To the extent that *Beauchamp* added that consideration as an element of the charge it has, in my view, been effectively overruled.

3. Can the fact of an accident alone establish the *actus reus* of careless driving?

[23] What rings loudly from the case law is that a contextual analysis must be undertaken in each case. Viewed in that light this issue need not be complex. If, in the circumstances, the only reasonable inference to be drawn from the fact of an accident is that the defendant was operating his or her vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway then the *actus reus* has been made out. It then falls upon the defendant to establish that he or she reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or that he or she took all reasonable steps to avoid the particular event.

[24] *R. v. McIver* [1965] 2. O.R. 475 (Ont.C.A.) is still applicable. *McIver* does not suggest that the fact of an accident is sufficient to establish the *actus reus* in **all** cases but simply that it **may** be sufficient depending on the circumstances. *McIver* does not purport to establish a new legal presumption in relation to highway traffic law. It simply re-states a venerable proposition applicable to inferences being drawn from circumstantial evidence. If the fact of an accident may give rise to reasonable inferences other than that the defendant was driving carelessly then it will not establish the *actus reus*.

4. Can inadvertent negligence establish careless driving?

[25] In *R. v. Wilson* [1970] O.J. No. 1658 (Ont.C.A.) the court took issue with a comment of the trial judge who had said, "... I feel compelled to come to the conclusion in the law that inadvertent negligence, however slight it may be, is **sufficient** for a conviction under this section." The Court of Appeal indicated in paragraph 3: "Mere inadvertent negligence, whether of the slightest type of or not, will not necessarily sustain a conviction for careless driving. In each instance, the Crown must prove beyond a reasonable doubt that the accused either drove his vehicle on a highway without due care and attention, or that he operated it without reasonable consideration for other persons using the highway. One of these two ingredients must be proven to support a conviction under this section."

[26] In light of the Supreme Court of Canada decisions in *Beatty* and *Roy* it seems clear that the gravamen of the offence of careless driving is inadvertent negligence. If the conduct of the defendant falls below the standard expected of a reasonably prudent driver in the circumstances then it is negligent and deserving of punishment under Provincial careless driving provisions. If it does not fall below the standard expected of a reasonable person then it is not negligence and does not amount to a lack of due care and attention.

[27] It appears to me that the position of the Supreme Court of Canada in *Beatty*

and *Roy* firmly supports the conclusion of the trial judge in *Wilson* and that the conclusion of the Ontario Court of Appeal can no longer be considered correct.

5. Is “momentary inattentiveness” a defence to careless driving?

[28] Again, the answer depends on the circumstances of each case. If, given all of the surrounding circumstances, momentary inattentiveness by a driver does not constitute a departure from the due care and attention or reasonable consideration demanded of an ordinarily prudent driver then it cannot constitute the offence of careless driving and is not punishable. If the court considers that given all of the circumstances the degree of inattentiveness displayed by the defendant goes beyond what one would expect of a reasonably prudent driver in such circumstances, then the offence has been made out.

[29] I emphasize that it is, in my view, incorrect to boldly state that momentary inattentiveness cannot constitute careless driving. The trier of fact must conduct an analysis of the evidence in each case and must measure the evidence of inattentiveness against the standard expected of a reasonably prudent driver.

6. What is the impact of evidence of proper driving over some distance and time prior to an incident of alleged careless driving?

[30] While an established pattern of proper and careful driving prior to an allegation of carelessness may negative any suggestion of a prolonged period of improper driving, it is not at all determinative of the issue at the time the poor driving is alleged to have occurred. If, at the time of the alleged careless driving, the driver displayed a lack of due care and attention or reasonable consideration for other persons using the highway, then the offence is made out. It is of no consequence that for some period prior to the commission of the offence the driving had been proper. Each case must be determined on its particular facts. What is required is an analysis of the conduct of the driver **at the time the offence is alleged to have been committed measured against the expectation of the conduct of a reasonably prudent driver.**

APPLICATION TO THE CASE AT HAND:

[31] Based on the findings of fact made by the Justice of the Peace in this case, the following are the relevant circumstances:

1. This incident occurred on a two-lane paved road in rural surroundings where the posted speed limit was 80 kilometres per hour.
2. It was a nice sunny day and the roads were clear.
3. Although the collision occurred on a gentle sweeping curve, visibility was unobstructed and the curve was not a factor in the collision.
4. The traffic was light.
5. The operator of the milk truck was travelling at 75 to 80 kilometres per hour and began to slow about 200 metres before the intersection at which he turned.
6. The operator of the milk truck applied his brakes taking between 5 and 8 seconds to slow to a stop. He then waited about 5 seconds for two oncoming vehicles to pass. He was 2 to 3 seconds into his turn when the rear of his vehicle was struck by the following vehicle operated by the defendant.
7. The brake lights and turn signals on the milk truck were functioning properly.
8. The defendant had been following the milk truck at a distance of 50 to 60 metres for about 5 kilometres without incident.
9. The left turn signal on the milk truck was activated as the vehicle began to slow prior to stopping at the intersection.
10. When he realized that the vehicle in front was stopping, the defendant applied his brakes heavily and left skid marks in excess of 75 feet on the roadway.

[32] The Justice of the Peace indicated in her reasons that she did not accept the evidence of the defendant that the milk truck had stopped suddenly. Moreover she indicated that the defendant had failed to take into consideration the conditions before the accident occurred or was not paying attention and further that he failed to keep a proper distance or failed to reduce his speed prior to the accident.

[33] I emphasize again that all of the surrounding circumstances must be taken into consideration. It is not just the fact of the accident that must be considered in this case, but that the accident occurred as it did in the circumstances described in the evidence as outlined above. On the evidence accepted by the Justice of the Peace, it was 12 to 16 seconds between the time that the operator of the milk truck signalled his intention to turn and applied his brakes to the time that he was struck in the rear by the defendant. In light of the evidence concerning the road conditions, the weather, the light traffic, the fact that both the turn and the braking had been

signalled by the milk truck operator, and the accident itself, there is no other reasonable conclusion but that the collision was caused as a result of a lack of due care and attention or consideration for other persons using the highway on the part of the defendant. Indeed, this was the conclusion of the Justice of the Peace. That being the case, then it is clear that the *actus reus* has been proved by the prosecution.

[34] The law is clear that this is a strict liability offence. There is no need for the prosecution to prove a *mens rea* element. Unless the defendant was able to satisfy the Justice of the Peace that the collision occurred through no fault of his own he ought to have been convicted. In this case the defendant failed to meet that onus. His evidence of a sudden stop by the milk truck was disbelieved by the Justice of the Peace and there was no other explanation proffered by him. Indeed, the Justice of the Peace was left to wonder in her reasons for decision as to why the accident occurred. The *actus reus* was made out and the defendant failed to satisfy the burden of establishing that he had done all that was reasonable in the circumstances.

[35] I am of the view that to the extent that the Justice of the Peace imposed a burden on the Crown to establish that the driving was “deserving of punishment” she was in error. If the *actus reus* is made out and if the defendant does not discharge the burden upon him to establish that he took all reasonable precautions in the circumstances then the charge has been proved beyond a reasonable doubt and the consequence of punishment must follow.

[36] To the extent that the Justice of the Peace considered that an error in judgment or inadvertent negligence were not sufficient to establish careless driving she was wrong in my view. Each case depends on its circumstances. In the circumstances of this case there can be no doubt that the conduct of the defendant fell below that which would be expected of a reasonably prudent driver. Bearing in mind the evidence of the manner in which the milk truck slowed, indicated its turn, stopped and then began its turn when it was safe to do so, this is not a case of mere momentary inattentiveness or an error in judgment that one might expect of a reasonably prudent driver. In all of the circumstances of this case a reasonably prudent driver simply would not have run into the rear of the milk truck.

[37] To the extent that the Justice of the Peace considered that the defendant had been driving appropriately for approximately 5 kilometres prior to the incident and that this might be determinative of the issue of whether or not he exercised due care and attention at the time of the collision she was incorrect. At page 46 of the judgment Her Worship said, “But that inadvertent negligence did not constitute the careless driving because there is nothing in his manner of driving prior to this incident which would indicate to the court that he was driving without paying or take due care and attention of what is happening in front of him.” With respect, it would appear clear that the Justice of the Peace concluded that the lack of attention shown by the defendant at about the time of the collision could not amount to careless

driving because there was nothing in his manner of driving prior thereto that appeared careless. Simply put, there is no logical connection between the appropriate driving over a period of 5 kilometres prior to the collision and the conduct of the defendant just prior to the collision. It is clear to me that the Justice of the Peace did not focus properly on the conduct of the defendant at the appropriate time and was swayed by evidence of his earlier driving.

[38] In light of the errors made by the Justice of the Peace this acquittal cannot stand. The appeal must be allowed. The issue is whether the matter ought to be sent back for a new trial or whether a conviction should be registered.

[39] The record is complete in my view and is amply sufficient for a final determination to be made. The Crown proved the *actus reus* of the offence. The defendant did not establish that he took all reasonable care in the circumstances. His manner of driving clearly fell below that expected of a reasonably prudent driver in all of the circumstances. On the record of this trial it is clear that the defendant is guilty of careless driving. I will register a conviction. I will order that the prosecutor and the defendant or his agent appear before me within 30 days in a court to be designated by the Trial Coordinator for sentencing.

Released: March 23, 2016

Signed: "Justice M.J. Epstein"